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In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES ARNOLD
SPECIALIST FIVE, UNITED STATES ARMY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether petitioner's sixth amendment right of confrontation was violated by the admission of the out-of-court statement of the alleged victim where the victim did not appear at trial and the government failed to demonstrate that the alleged victim was unavailable for purposes of the sixth amendment and where that statement lacked sufficient indicia of reliability and trustworthiness.

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CHARLES ARNOLD
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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Charles Arnold, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 25 M.J. 129 (C.M.A. 1987)(Appendix A). The opinion of the United States Army Court of Military Review is reported at 18 M.J. 559 (A.C.M.R. 1984)(Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1987, affirming petitioner's conviction dated February 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3)(Supp. II 1984).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States provides:

> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . ."

STATEMENT OF THE CASE

Petitioner was tried by a general court-martial composed of officer and enlisted members at Mannheim, Federal Republic of Germany, on February 22 and 23, 1982. Contrary to his pleas, he was convicted of one charge of taking indecent liberties with his daughter, who was under the age of 16.[1] Petitioner was sentenced to confinement for five years, forfeiture of all pay and allowances, reduction to the lowest enlisted grade and to receive a bad-conduct discharge from the service. The sentence to confinement was reduced to three years by the authority who convened the court-martial. The United States Army Court of Military Review affirmed the findings of guilty and the sentence. The United States Court of Military Appeals affirmed the lower court's decision.

The government's case against petitioner was based on his confession and the victim's out-of-court statements to her school counselor, the school nurse, and an agent of the Criminal Investigation Division (C.I.D.). The victim did not appear at trial nor was she subpoenaed.[2] The government took only informal steps the morning of trial to obtain the victim's presence (R. 102, 142). At trial, the government offered the victim's out-of-court statements through the testimony of the persons to whom those statements were made. The statements to the school counselor and the school nurse were admitted by the trial judge over defense objection as excited utterances pursuant to Mil.R.Evid. 803(2), Manual for Courts-Martial, United States, 1969 (Revised edition) (R. 107). The victim's written statement to C.I.D. was admitted over defense objection pursuant to Mil.R.Evid. 803(24) (residual hearsay exception)(R. 188-189). The Army Court of Military Review held that the statements to the school nurse and C.I.D. were inadmissible but that their admission was not prejudicial.[3]

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[1] A violation of Uniform Code of Military Justice, Article 134, 10 U.S.C. § 934 (1982).

[2] Arnold, 25 M.J. at 130.

[3] Arnold, 18 M.J. at 561-62.

The facts alleged may be briefly stated. The victim was petitioner's 13-year-old daughter. She alleged that petitioner approached her in the kitchen of their home on November 15, 1981, and fondled her pubic area. Later that same evening, petitioner entered her bedroom and told her to remove her underpants. Petitioner apparently heard his wife exiting the shower and departed the victim's room. He returned later and attempted sexual intercourse. The next morning the victim approached her guidance counselor at school and asked to speak to him. When the guidance counselor saw her approximately one hour later, her first comment was: "Is the father supposed to be the first one to have sex with you?" This prompted questioning by the counselor and soon the full story was told. Subsequently, she repeated her allegations in the presence of the school nurse and gave a statement to a C.I.D. agent.[4] The school counselor testified that the victim was normally very "bubbly" but on this occasion she was "very subdued" (R. 152).

On November 6, 1981, petitioner denied the allegations against him in a statement to C.I.D. agents. However, on November 13, 1981, he confessed to the alleged acts. On December 22, 1981, the victim recanted her statements. Petitioner recanted his confession at trial.[5]

The issues litigated below and considered by the Court of Military Appeals as a prerequisite to this Court's jurisdiction were:

I

WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED IN HOLDING THAT . . . [THE VICTIM'S] OUT-OF-COURT DECLARATION TO HER SCHOOL COUNSELOR CONSTITUTED AN EXCITED UTTERANCE UNDER MIL.R.EVID. 803(2).

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[4] The latter two statements are those found inadmissible by the Army Court of Military Review. *Id.*

[5] Arnold, 25 M.J. at 131.

II

WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED IN HOLDING THAT THE ERRONEOUS ADMISSION OF . . . [THE VICTIM'S] OUT-OF-COURT STATEMENTS TO HER SCHOOL NURSE AND TO THE CID WAS NOT PREJUDICIAL TO APPELLANT.

III

WHETHER APPELLANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED BY ADMISSION OF THE ALLEGED VICTIM'S OUT-OF-COURT STATEMENTS, WHERE THE GOVERNMENT FAILED TO DEMONSTRATE (1) ACTUAL UNAVAILABILITY OF THE ALLEGED VICTIM AND (2) SUFFICIENT STEPS TO SECURE HER PRESENCE AT THE COURT-MARTIAL.

IV

WHETHER THE MILITARY JUDGE ERRED IN HIS CHARACTERIZATION OF . . . [THE VICTIM'S] STATEMENT TO THE CID AS A PRIOR CONSISTENT STATEMENT AND IN HIS INSTRUCTION TO THE MEMBERS TO CONSIDER THAT OUT-OF-COURT DECLARATION AS A PRIOR CONSISTENT STATEMENT.

REASONS FOR GRANTING THE WRIT

In resolving this case against petitioner, the Court of Military Appeals states in its plurality opinion[6] that two questions are presented:

1. Is the statement to the school counselor an "excited utterance?"

[6] Two members of the three member Court of Military Appeals do not reach the confrontation issue. Judge Sullivan, in his opinion concurring in the result, would affirm based on petitioner's confession as corroborated

2. Did admitting the hearsay testimony in lieu of the victim's appearance at trial violate appellant's right to confront witnesses against him as provided by the Sixth Amendment to the Constitution?[7]

The court held that the statement of the victim to the school counselor was an excited utterance and therefore admissible as an exception to the hearsay rule.[8] The court went on to hold that because the statement fell within the "long-established, well recognized" excited utterance exception to the hearsay rule, no showing of unavailability was required for purposes of the Confrontation Clause. 25 M.J. at 133, *citing United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986) and *Ohio v. Roberts*, 448 U.S. 56 (1980). Whether or not a showing of unavailability is required for purposes of the Confrontation Clause when a statement falls within a firmly-rooted hearsay exception is an important federal question which has not been settled by this Honorable Court. Further, the decision of the Court of Military Appeals on this issue is in conflict with the decisions of this Honorable Court interpreting the requirements of the Confrontation Clause.

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by petitioner's presence in his own home at the time of the incident and the victim's agitated demeanor the morning after the incident. Arnold, 25 M.J. at 134 (Sullivan, J., concurring in the result). Chief Judge Everett, in his dissenting opinion, concludes that the victim's statement to her school counselor was not an excited utterance nor did it fall within any other established hearsay exception. Therefore, its admission and the admission of her other statements transgressed petitioner's right of confrontation which is error of constitutional dimensions requiring remand. *Id.* at 134-5 (Everett, C.J., dissenting).

[7] *Id.* at 132.

[8] *Id.*

I.

THE HOLDING OF THE COURT OF MILITARY APPEALS, THAT A SHOWING OF UNAVAILABILITY OF A DECLARANT IS NOT REQUIRED FOR PURPOSES OF THE CONFRONTATION CLAUSE, WHERE THE OUT-OF-COURT STATEMENT OF THE DECLARANT IS OFFERED UNDER A FIRMLY-ROOTED EXCEPTION TO THE HEARSAY RULE, IS CONTRARY TO THIS COURT'S INTERPRETATION OF THE REQUIREMENTS OF THE CONFRONTATION CLAUSE AND RELEGATES THE CLAUSE TO A MERE CODIFICATION OF THE RULES OF HEARSAY.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court analyzed in great detail the relationship between the Confrontation Clause and the hearsay rule. While this Court did not " 'map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions' (citations omitted)," *Id.* at 64-5, a general approach to the problem was identified and concisely stated:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability may be inferred without more in a case where evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. (Footnote omitted).

Id. at 66.

In establishing a requirement of unavailability, this Court recognized the "Framers' preference for face-to-face accusation" and that the sixth amendment establishes a "rule of necessity" i.e., "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65.[9] However, a showing of unavailability by the proponent of a

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[9] *Citing* Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 458 (1900).

hearsay statement need not always be made. In *Dutton v. Evans*, 400 U.S. 74 (1970), a witness testified as to a conversation he had with Evans' co-conspirator in the Atlanta Penitentiary. That testimony was admitted under a long standing co-conspirator exception to the hearsay rule under Georgia law. This Court found that the extrajudicial statement involved was of only "peripheral significance"[10] and that the utility of cross-examination was so remote that the Confrontation Clause did not require production of an apparently available witness. This is not the situation in the instant case where the victim was the only true witness against petitioner.

Neither a showing of unavailability nor production is required where the out-of-court statement offered is that of a co-conspirator made during the course of, or in furtherance of, a conspiracy. *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986). In *Inadi*, this Court overruled the decision of a lower court applying the *Ohio v. Roberts* rule of unavailability to such statements. This Court recognized the unique nature of the statements of a co-conspirator made in furtherance of, or in the course of, a conspiracy[11] and concluded that such statements should be admissible irrespective of the availability or unavailability of the declarant. In the instant case, the Court of Military Appeals cites *Inadi*, apparently for the proposition that if a hearsay statement falls within a firmly rooted hearsay exception, no showing of unavailability is required. *Arnold*, 25 M.J. at 133. See also, *United States v. Hines*, 23 M.J. 125, 128 fn.6 (C.M.A. 1986). This Court's decision in *Bourjaily v. United States*, ____ U.S. ____, 107 S.Ct. 2775 (1987), indicates that such a broad reading of *Inadi* is not supportable. *Bourjaily*, like *Inadi*, involved the hearsay statements of a co-conspirator offered by the prosecution. In *Bourjaily*, this Court reiterated the two

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[10] *Id.* at 87.

[11] "Such statements provide evidence of the conspiracy's context that cannot be replicated . . . . the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying . . . . [I]n-court testimony seldom will reproduce a significant portion of the evidentiary value . . . ." *Id.* 106 S.Ct. at 1126-7.

step approach of *Ohio v. Roberts* and then pointed out that in *Inadi* the first requirement for a showing of unavailability was eliminated when the hearsay statement is that of a co-conspirator. *Bourjaily*, 107 S.Ct at 2782.[12]

Thus, *Inadi* stands only for the proposition that a showing of unavailability is not required when the hearsay statement involved is that of a co-conspirator. The statement involved in the instant case does not fall within the co-conspirator exception to the hearsay rule. Therefore, the Court of Military Appeals' abrogation of the unavailability rule based on *Inadi* is incorrect. Although this Court stated in *Ohio v. Roberts* that reliability may be inferred, without more, when a hearsay statement falls within a firmly rooted hearsay exception, this Court has never held that unavailability may be inferred on the same basis.[13]

In the case *sub judice*, both the Army Court of Military Review and the Court of Military Appeals recognized that there was no showing of unavailability after a good-faith effort to make the witness available.[14] As stated by the Army Court:

> In the case before the Court, the government failed utterly to show unavailability. Indeed, the record contains no evidence that the government used any of the means available to secure the presence of the witness, even though the trial judge offered the use of his judicial authority to do so.

Arnold, 18 M.J. at 561. The Court of Military Appeals acknowledged this fact. *Arnold*, 25 M.J. at 131. Therefore, the requirements of the Confrontation Clause have not been satisfied and the victim's statement to her school counselor should not have been admitted.

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[12] This Court went on to hold that the co-conspirator exception to the hearsay rule is firmly rooted and therefore no separate inquiry as to the indicia of reliability of such a statement need be made, the second step of the Ohio v. Roberts approach.

[13] *But see*, State v. Flores, No. 51790 (Ohio Ct. App. Feb. 26, 1987); People v. Hughey, 194 Cal.App.3d 1383, 240 Cal. Rptr. 269 (Cal. Ct. App. 1987); State v. Wilson, 719 S.W.2d 28 (Mo. Ct. App. 1986).

[14] Ohio v. Roberts, 448 U.S. at 74.

II.

THE STATEMENT OF THE VICTIM TO HER SCHOOL COUNSELOR DOES NOT BEAR ADEQUATE INDICIA OF RELIABILITY TO SATISFY THE PURPOSES OF THE CONFRONTATION CLAUSE NOTWITHSTANDING ITS CHARACTERIZATION AS AN EXCITED UTTERANCE BY THE COURT BELOW.

The second aspect of the two-prong approach of *Ohio v. Roberts* requires that the hearsay sought to be admitted, be marked "with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Id.* at 65, *citing Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934). The reason of the general rule as explained by *Snyder* is to prevent a conviction based on depositions or *ex parte* affidavits and to preserve the accused's right to test the recollection of a witness through cross-examination. If a declarant is unavailable and his out-of-court statement falls within a firmly rooted hearsay exception, reliability can be inferred and the purposes of the Confrontation Clauses are met.[15] The fact that the excited utterance exception[16] is a firmly rooted hearsay exception is not at issue here. *See Puleio v. Vose*, No. 87-1135 (1st Cir. Oct. 9, 1987)(WESTLAW Allfeds library); *United States v. Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1057 (6th Cir. 1983) *cert. denied* 464 U.S. 1071 (1984). *See also, United States v. Cree*, 778 F.2d 474, 501-02 (8th Cir. 1985)(Oliver, J., dissenting). The issue is also not whether the statement of the victim in this case is admissible as an excited utterance under Mil.R.Evid. 803(2) as applied by the military courts. The issue is whether or not the extrajudicial statement of the victim contains "sufficient indica of reliability and guarantees of trustworthiness to satisfy the interests protected by the confrontation clause." *Haggins*, 715 F.2d at 1057.[17]

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[15] Ohio v. Roberts, 448 U.S. at 66.

[16] Mil.R.Evid. 803(2) is taken verbatim from Fed.R.Evid. 803(2). Manual for Courts-Martial, United States, 1969 (Revised edition), Mil.R.Evid. 803(2), analysis.

[17] Although reliability may be inferred when an extrajudicial statement falls within a firmly rooted hearsay exception (Ohio v. Roberts, 448 U.S. at 66), such reliability is only an inference and not a presumption.

In *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050 (6th Cir. 1983) *cert. denied* 464 U.S. 1071 (1984), the court listed three elements which are necessary for a hearsay statement to be considered an excited utterance under the federal rules and therefore satisfy the Confrontation Clause: there must be an event which is startling enough to cause nervous excitement; the statement must be made before there is time for the declarant to contrive or misrepresent; and, the statement must be made while the declarant is under the stress of the excitement caused by the event. *Id.* at 1057. Application of these criteria in the instant case reflect that the statement of the victim does not contain sufficient indicia of reliability and guarantees of trustworthiness to satisfy the Confrontation Clause not withstanding its characterization as an excited utterance by the Court of Military Appeals.

Only Chief Judge Everett in his dissent comes close to a proper analysis of the statement under consideration. As he notes, the declarant and victim was 13 years of age at the time of the event, not one of tender years who would, perhaps, be likely to sustain the excitement arising from the event for a long period. When the declarant first approached her school counselor, she was "very quiet, subdued," and not excited. The statement involved was not made until almost an hour and a half after the declarant first approached her counselor and asked to speak to him. Then, the declarant began the conversation by asking whether "the father [is] supposed to be the first one to have sex with you?" The accusations against appellant were made only after the counselor asked her why she wanted to know. The declarant only became agitated and started crying later in the interview. *Arnold*, 25 M.J. at 134-5 (Everett, C.J., dissenting). The declarant's age and her demeanor prior to and during her statement, when coupled with the fact that the alleged event occurred more than 12 hours before in her home with her mother present, clearly show that the declarant had time to reflect on the event and that at the time of her statement she was not under the stress of the excitement caused by that event. Although she may have been excited about telling her

story to the school guidance counselor, the stress of the excitement generated by the event had passed.[18] Therefore, because there was time for reflective thought unimpeded by excitement generated by the event, and because the declarant recanted her statement prior to trial, that statement does not bear the indicia of reliability and guarantees of trustworthiness necessary to satisfy the purposes of the Confrontation Clause, notwithstanding the decision of the Court of Military Appeals to the contrary.

CONCLUSION

The Court of Military Appeals affirmed the conviction of petitioner. That conviction was based on his own recanted confession and the repudiated, extrajudicial, oral statement of the 13-year-old victim. The only true witness against petitioner, the victim, was never present at trial, she was never subjected to cross-examination, and her demeanor was never subject to scrutiny by the trier-of-fact. Her damning allegations were merely repeated at trial by a third party to whom they were made after the victim had time for reflective thought and after the excitement of the events she related had passed. The necessity for proceeding against petitioner in this manner was never demonstrated by the government. Indeed, as recognized by the courts below, there was no showing by the government that the victim was unavailable for purposes of the Confrontation Clause. Petitioner's right of confrontation was violated by admission of the victim's extrajudicial

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[18] Judge Cox in his plurality opinion notes that it may be "more intellectually honest" to consider the statement under Mil.R.Evid. 803(24), a residual hearsay exception. Arnold, 25 M.J. at 133, fn. 4.

statement in this case. The violation was neither minimal nor justified. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 50,323.
CM 442627.

UNITED STATES, APPELLEE,

v.

CHARLES ARNOLD, SPECIALIST FIVE
U.S. ARMY, APPELLANT.

Sept. 30, 1987

For Appellant: *Captain Pamela G. Montgomery* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel Arthur L. Hunt, Major Stephen R. Dooley, Captain Alan D. Groesbeck, Captain David L. Carrier* (on brief); *Colonel Brooks B. La Grua, Major Eric T. Franzen, Captain William T. Wilson, Captain Karen S. Davis.*

For Appellee: *Captain Richard Parker* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Patrick M. Flachs, Captain Edmond R. McCarthy, Jr.*

OPINION

COX, Judge:

Appellant was tried by general court-martial on February 22 and 23, 1982. The court was convened at Mannheim, Federal Republic of Germany, and was composed of officer and enlisted members. Despite his pleas, he was found guilty of taking indecent liberties with and committing lascivious acts upon his daughter, who was under 16 years of age, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to be confined for 5 years; to forfeit all pay and allowances; to be reduced to pay grade E-1;

and to receive a bad-conduct discharge from the Army. The convening authority reduced the confinement to 3 years but otherwise approved the findings and sentence as adjudged. The Court of Military Review affirmed. 18 M.J. 559 (1984).

This is yet another child-abuse case where the Government proved its case through use of an accused's confession and statements made to an intermediary by the complaining witness. *See United States v. Barror*, 23 M.J. 370 (C.M.A.1987), and *United States v. Hines*, 23 M.J. 125 (C.M.A.1986).[1] The victim failed to appear at trial. Furthermore, in spite of defense counsel's objection, she was not subpoenaed; the military judge did not abate the proceedings until she was available; she was not deposed pretrial; and no other legal means were employed to compel her to appear. Indeed, although the Government made some informal effort to locate the witness, trial counsel's assertions to the court members made it abundantly clear that he had no intention of calling the witness to the stand. Instead, he said he would rely on appellant's confession and statements made by the victim to her school counselor, the school nurse, and agents of the Criminal Investigation Command (CID) to corrobate that confession.[2]

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[1] In *United States v. Barror*, 23 M.J. 370 (C.M.A.1987), we considered whether a written statement given to agents of the Air Force Office of Special Investigations by appellant's stepson, alleging that appellant had sexually assaulted him, was admissible under Mil.R.Evid. 804(b)(5). In *United States v. Hines*, 23 M.J. 125 (C.M.A.1986), we considered whether, pursuant to the residual-hearsay exception, the military judge erred by admitting into evidence written statements made by the three key witnesses after they refused to testify in person at either the Article 32, Uniform Code of Military Justice, 10 U.S.C.§ 832, investigation or the trial.

[2] We agreed to review four issues to determine:

I

WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED IN HOLDING THAT . . . [THE VICTIM'S] OUT-OF-COURT DECLARATION TO HER SCHOOL COUNSELOR CONSTITUTED AN EXCITED UTTERANCE UNDER MIL.R.EVID. 803(2).

II

WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED IN HOLDING THAT THE ERRONEOUS ADMISSION OF . . . [THE

According to the Government, on the night of November 5, 1981, appellant approached his 13-year-old daughter in the kitchen of their home "and felt her up" by fondling "her pubic area." Later that evening he entered her bedroom and told her to remove her underpants, which she did. Appellant heard his wife coming out of the shower and left the room, instructing his daughter to leave her pants off. He returned later, climbed into bed with her, removed his penis from his trousers, and "attempted to" have sexual intercourse with her explaining that he was only doing it because "fathers are supposed to be the first ones to have sex with their daughters."

The next morning, November 6, the daughter went to school and immediately sought out Mr. McGee, her high school counselor, and told him "that she had to see" him. He arranged for her to talk with him after her second-period class. Mr. McGee testified that the victim normally was "a very bubbly . . . girl," but on that day "[s]he . . . seemed to be really agitated" and "very, very subdued"; "[s]he was crying . . . [and he] had to give her Kleenexes." During their conversation, the child asked, "Is the father supposed to be

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VICTIM'S] OUT-OF-COURT STATEMENTS TO HER SCHOOL NURSE AND TO THE CID WAS NOT PREJUDICIAL TO APPELLANT.

III

WHETHER APPELLANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED BY ADMISSION OF THE ALLEGED VICTIM'S OUT-OF-COURT STATEMENTS, WHERE THE GOVERNMENT FAILED TO DEMONSTRATE (1) ACTUAL UNAVAILABILITY OF THE ALLEGED VICTIM AND (2) SUFFICIENT STEPS TO SECURE HER PRESENCE AT THE COURT-MARTIAL.

IV

WHETHER THE MILITARY JUDGE ERRED IN HIS CHARACTERIZATION OF . . . [THE VICTIM'S] STATEMENT TO THE CID AS A PRIOR CONSISTENT STATEMENT AND IN HIS INSTRUCTION TO THE MEMBERS TO CONSIDER THAT OUT-OF-COURT DECLARATION AS A PRIOR CONSISTENT STATEMENT.

the first one to have sex with you?" When he questioned her motives for asking such a thing, "that just opened the gate, . . . she started explaining in detail what had happened . . . the previous night."

Mr. McGee summoned the school nurse, and the story was repeated in her presence. Later that day, the girl was taken to the CID office, where she made another statement, and an investigation began.

On November 6, appellant rendered a statement to CID agents in which he denied the allegations against him. However, on November 13, he gave CID agents a second, sworn, written statement in which he admitted committing the alleged acts. Appellant recanted this confession at trial, and the victim recanted her statement on December 22, stating, "I would like to say my first statement was not true. I do believe it could have been a dream."

At trial, the Government, through examination of Mr. McGee, offered the hearsay testimony of the victim. The military judge admitted the testimony as an "excited utterance" pursuant to Mil.R.Evid. 803(2), Manual for Courts-Martial, United States, 1969 (Revised edition). He likewise admitted the testimony of the school nurse recounting the victim's statements to her as an "excited utterance" and the victim's November 6 statement as one of the "other exceptions" to the hearsay rule. Mil.R.Evid. 803(24).

The Court of Military Review held that the military judge erred in admitting the nurse's statement as an "excited utterance" because, "[w]hile the two declarations [to the counselor and the nurse] were part of a continuous episode, the second [to the nurse] was more a result of the counselor's action in initiating the discussion with the nurse and the statement more a result of their urgings and questions." The court likewise found that the statements to the CID were not admissible under Mil.R.Evid. 803(24), deferring to Mil.R.Evid. 804(b)(5) as the operative rule appearing to be "specifically designed to address the problem of family members who are witnesses to an intra-family criminal offense." This rule requires a determination that the witness is "unavailable," which was not done in this case. In fact, there

is no showing that the witness was unavailable in the legal sense. 18 M.J. at 561.

The court further found that admitting the nurse's and the CID agent's testimony regarding the victim's statements to them constituted harmless error in view of appellant's confession and the cumulative nature of the evidence.

We agree. First, we hold that appellant's confession, as corroborated by the victim's spontaneous and unsolicited "excited utterances" to her school counselor, were ample evidence, certainly sufficient to convict appellant beyond a reasonable doubt. Second, we find that admission of the additional statements, albeit error as decided by the Court of Military Review, was harmless error beyond any reasonable doubt. Art. 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Davis*, 20 M.J. 61 (C.M.A.1985); *United States v. Remai*, 19 M.J. 229 (C.M.A. 1985).

Two questions are presented in resolving this case against appellant.

1. Is the statement to the school counselor an "excited utterance?"

2. Did admitting the hearsay testimony in lieu of the victim's appearance at trial violate appellant's right to confront witnesses against him as provided by the Sixth Amendment to the Constitution?

Unfortunately, neither the Military Rules of Evidence nor case law of this Court – or other courts – have established a "bright line" rule on "excited utterances." But it is universally recognized that, in order for there to be an excited utterance, the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981), *citing* numerous cases. Further, the event must be "startling." *United States v. LeMere*, 22 M.J. 61, 67 (C.M.A.1986). And most importantly, the declarant must be "under the stress of excitement caused by the event." Mil.R.Evid. 803(2). Here, even though at least 12 hours had passed before the victim's first statement was made, "[t]he lapse of time between the startling event and the out-of-court statement although relevant is not dispositive in the applica-

tion of rule 803(2)." 633 F.2d at 85, *citing Garcia v. Watkins*, 604 F.2d 1297, 1300 (10th Cir.1979).

We are convinced by the facts and circumstances of this case that the *girl's unsolicited, spontaneous statements to her school counselor at the first available opportunity* while she was "very, very agitated" were indeed "excited utterances."[3] The victim was acting not only under the influence of the attempted sexual asssault but also under the threat of being shot by her father.

While we "yield to no one in . . . [o]ur respect for the Confrontation Clause of the Sixth Amendment," *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 2066, 90 L.Ed. 2d 514 (1986)

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[3] "A fresh complaint of a sexual offense may come within . . . [the] exception [for excited utterances] depending on the circumstances." Analysis of Mil.R.Evid. 803(2), Manual for Courts-Martial, United States, 1969 (Revised edition), p. A18-103. *See United States v. Smith*, 14 M.J. 845 (A.C.M.R.1982) (evidence of fresh complaint of a sexual offense which is nonhearsay or fits within another exception to the hearsay rule is relevant and admissible). Several states have adapted their hearsay exceptions to accommodate the complaints of child victims. In *State v. Garay*, 453 So.2d 1003, 1007 (La.App. 4th Cir.1984), the court stated that their *res gestae* exception, "defined as 'events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive, and spontaneous words and acts of the participants, and not the words of the participants when narrating the events,' " has been "repeatedly interpreted" by the Louisiana Supreme Court

> to admit the original complaint of a young child when the . . . facts and circumstances of the case indicate that it was a product of a shocking episode and not a fabrication. The original complaint of the young child is the statement made at the first reasonable opportunity under the particular facts and circumstances of the case.

(Citations omitted.) The court further opined that "[a] very young child raped by an adult standing in the position of parent, caretaker, or friend cannot be expected to immediately come forward with a complete and exact report of the event . . . [T]he child may be unable to speak about the incident until" the child is "safely in the presence of a compassionate adult whom" the child "can trust." *See People v. Taylor*, 66 Mich.App. 456, 239 N.W. 2d 627 (1976); *see also Sparks v. State*, 172 Ga.App. 891, 324 S.E. 2d 824, 825 (1984) (admissibility of child's statement not dependent upon "any arbitrary time, . . . but is left to the sound discretion of the court in determining . . . whether declarations meet the requirements of being free from 'all suspicion of device or afterthought' "). *See generally* 89 A.L.R. 3d 102 (1979 & Supp.1987).

(Blackmun, J., dissenting), *see United States v. Hines, supra,* we are satisfied that we do not impinge upon its awesome guarantees by holding that long-established, well-recognized exceptions to the hearsay rules, such as "excited utterances," are so inherently reliable as to be admissible and, thus, conform to the constitutional guarantee of confrontation. *See United States v. Dunlap,* Dkt. No. 53393, __ M.J. __ (C.M.A. September 1987). Under such circumstances, we are also convinced that a showing of unavailability is not required, although we prefer that every reasonable effort be made to ensure the appearance of the witness. *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Furthermore, here, as in *United States v. Hines, supra,* "appellant's admissions so confirm the reliability of the declarant's statements, at least to the extent of actual corroboration, that our misgivings about 'afford[ing] the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' . . . are . . . extinguished." *Id.* at 137-38 (footnote omitted), *citing California v. Green,* 399 U.S. 149, 161, 90 S.Ct. 1930, 1936, 26 L.Ed.2d 489 (1970).

Let there be no doubt, however, that this Court favors confrontation, and this case should be read very narrowly. *United States v. Hines; supra; United States v. Cokeley,* 22 M.J. 225 (C.M.A.1986). But, we recognized that "[t]here is a real world as well as a theoretical one," *Lee v. Illinois, supra* at 2066. When a child reports sexual abuse to a trusted school counselor the first thing the morning after it has happened, in a highly-agitated and emotional condition, and, later, after being warned of his constitutional rights to remain silent and to engage the services of a lawyer, the alleged defendant confesses to the very acts of which the child has complained, it is time to apply real-world standards and uphold his conviction.[4]

The decision of the United States Army Court of Military Review is affirmed.

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[4] Although Chief Judge Everett may be technically correct that the victim did not uncontrollably scream out her complaint about her father within minutes after the attack, his perception of how excitement manifests itself

SULLIVAN, Judge (concurring in the result):

I would affirm the conviction even without the challenged hearsay statements. Appellant's sworn voluntary confession was sufficiently corroborated by his admitted presence at the scene of the incident that night and by his daughter's agitated demeanor the morning after the incident. Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1969 (Revised edition); *United States v. Yeoman*, 25 M.J. 1 (C.M.A.1987). In any event, this girl victim was under a gun threat by her

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in adolescent girls is, in my opinion, incorrect. The "stress of excitement" can linger long after a traumatic episode and not manifest itself until the child is in the company of friends, confidants, teachers, ministers, or others they trust. Is it written in stone that every female (or male for that matter) must or will react in a prescribed manner to a given situation? Of course not. For example, if three people happen to see a fatal accident, one might want to get a closer look, one might pass out immediately and the third might become hysterical or sick. Can any man comment on how or what a female feels when she's sexually assaulted – just as males cannot comment on the pain of childbirth? Add to that the fact that a girl is assaulted by her own father, a person to whom she is supposed to look for love, guidance, protection, and care, and only God knows what she will do – some have been known to *never* say a word until years have passed, and sadly, some commit suicide. *Commonwealth of Va. v. Paul J. Kauffman*, Crim. No. 18055 (13-year-old girl took her own life by jumping into the path of oncoming train; during investigation by Prince William County authorities to determine why this child would commit suicide, her personal diary was uncovered, wherein she had made numerous entries describing sexual assaults upon her by her father; defendant was tried by jury and convicted on Jan. 9, 1987; case has been appealed to the Court of Appeals for the Commonwealth of Virginia). Silence does not mean they were not traumatized.

Here, the communication with the school counselor, a person who knew the girl well enough to detect substantive differences in her demeanor, was made at the *first opportunity* this young girl had to "utter" her complaint. The fact that she did not appear at trial does not render her statements false. Theoretically, the lapse of time between the date of the incident and the trial was sufficient to permit this young girl to be pressured in various ways not to testify, *i.e.*, she continued to reside at home and could see firsthand the stress placed on the family unit by appellant's arrest and forthcoming trial. This could by itself, cause a young girl to bolt as this one did.

Although it may be more intellectually honest to fit this evidence into Mil.R.Evid. 803(24), there is ample authority to support its admission as an "excited utterance." *See* n. 3, *supra*.

father when she made the statement to Mr. McGee. Mil.R.Evid. 803(2).

EVERETT, Chief Judge (dissenting):

I

The alleged victim – appellant's stepdaughter – did not appear at the trial; and, apparently, no effort was made by the Government to secure her presence. In her absence, the prosecution, over strenuous defense objection, introduced in evidence several out-of-court statements by her on the day after the alleged offense. The first was to a high school counselor, Mr. McGee; the next was in the presence of Mr. McGee and a school nurse, Mrs. Frank; and finally there was a written sworn statement to agents of the Criminal Investigation Command (CID). Both the principal opinion and the Court of Military Review hold that the latter two statements were inadmissible. I fully agree. However, I am at odds with their conclusion that the first statement to Mr. McGee was admissible as an excited-utterance hearsay exception under Mil.R.Evid. 803(2), Manual for Courts-Martial, United States, 1969 (Revised edition).

The rationale of this exception is "that persons are less likely to have concocted an untruthful statement when they are responding to the sudden stimulus of 'a startling event.' " *United States v. LeMere*, 22 M.J. 61, 68 (C.M.A. 1986). Unlike the requirement under the original version of the 1969 Manual for Courts-Martial (para. 142*b*), which authorized admission in evidence of a declarant's "spontaneous exclamation," there is no requirement under the Military Rules of Evidence of "independent evidence of the startling event which gave rise to" the excited utterance. *See United States v. Sandoval*, 18 M.J. 55, 62 (C.M.A.1984). However, the excited utterance must occur "while the declarant was under the stress of excitement caused by the event or condition." *United States v. LeMere, supra* at 67.

In *LeMere* this Court agreed with the Court of Military Review that a statement made by a 3-and-a-half-year-old daughter to her mother the morning after the alleged sodomy could not qualify as an excited utterance, because the declarant clearly was no longer "under the stress of excite-

ment" after a 12-hour lapse of time. In the present case, it is even more difficult than it would have been in *LeMere* to justify reception of the statement, because the alleged victim was 13 years of age and probably would be less likely than a younger child to sustain for a long period any excitement resulting from the alleged event.*

When the girl had first come in to see Mr. McGee, she had been "very quiet, subdued," rather than excited. Then, over an hour and a half passed between the time that she first approached Mr. McGee and asked to speak with him and when she finally talked with him. Thus, there was ample opportunity for reflection; and so the latter conversation with this counselor clearly does not comply with the rationale of an "excited utterance"–namely, that if someone makes a statement about an emotional event before having an opportunity to reflect, it is likely to be truthful. When she did commence the conversation, it began not with a statement but with the question whether "the father [is] supposed to be the first one to have sex with you?" Only when Mr. McGee asked why she was inquiring, did she volunteer her accusations against appellant. According to Mr. McGee, she began crying later in the interview; but it would be bootstrapping to reason that excitement generated by telling about an event can give rise to the "excited utterance" contemplated by Mil.R.Evid. 803(2). Subsequently, when Mrs. Frank, the school nurse, was present, the girl was at times very calm and staring off into space.

If the statement to Mr. McGee was inadmissible, almost nothing is left of the Government's case. Judge Sullivan refers to appellant's "admitted presence at the scene of the incident that night and . . . his daughter's agitated demeanor the morning after the incident." However, I perceive little significance in Arnold's "presence" in the home where he and his daughter lived; and I am not sure what was the "agitated demeanor" and why it should be given much weight.

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* As I have commented elsewhere, "Judge Clause apparently believed that for a small child excitement can continue much longer than for an adult." *United States v. LeMere*, 22 M.J. 61, 68 (C.M.A.1986); *see United States v. LeMere*, 16 M.J. 682, 688 (A.C.M.R.1983) (Clause, S.J., concurring.)

Of course, the issue is not one of the sufficiency of evidence to corroborate a confession but instead whether an accused has been prejudiced by reception of inadmissible evidence. It has not even been argued to this Court that, if the statement to Mr. McGee was inadmissible, error in receiving it was not prejudicial. While I do not believe such an argument has merit, it would seem that, before appellant's conviction is affirmed on this ground, the case should be remanded to the Court of Military Review for consideration of the issue of prejudice.

II

In my view, even if the statement to Mr. McGee was properly admitted – as Judge Cox and the Court of Military Review believe is true – appellant is still entitled to a retrial because of the erroneous admission of the other statements – especially the girl's detailed written statement to the CID.

Here, unlike *LeMere,* the alleged victim did not testify at trial and so could not be observed by the factfinder. *Cf. United States v. White,* 25 M.J. 50 (C.M.A.1987) (Everett, C.J., concurring). No showing has been made that she was unavailable; and, since she had apparently attempted to repudiate her pretrial statements, the Government probably was quite content not to have her testify. Her out-of-court statements do not fall within any established hearsay exception.

Accordingly, any error in admitting the extrajudicial statements was of constitutional dimensions and transgressed appellant's right of confrontation. Consequently, the test for affirmance is whether the appellate court is convinced beyond a reasonable doubt that the accused was not prejudiced by the error at trial. *United States v. Remai,* 19 M.J. 229 (C.M.A.1985).

Under such a test, I cannot see how Arnold's conviction can be affirmed. Indeed, if the statement to Mr. McGee was inadmissible, I cannot understand how the conviction could be

upheld under *any* harmless error test with which I am familiar.

III

In closing, I emphasize that I abhor child abuse as much as anyone; and I recognize the difficulties a prosecutor must face in such cases. However, I also recognize that children sometimes make false accusations of sexual abuse and that even a confession is not conclusive evidence of guilt. The rights of a child victim are important; but so, too, are the constitutional rights of a criminal defendant, especially when faced with accusations of committing crimes which stir such deep feelings as these.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 442627.

UNITED STATES, APPELLEE,

v.

SPECIALIST FIVE CHARLES ARNOLD, SSN 253-74-8023, UNITED STATES ARMY, APPELLANT.

30 May 1984.

Captain Mark W. Harvey, JAGC, argued the cause for appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Lieutenant Colonel Arthur L. Hunt, JAGC, Major Robert C. Rhodes, Major Paul J. Luedtke, JAGC, Major Robert M. Ott, JAGC, Captain Barry Rothman, JAGC, and Captain Michael T. Kelly, JAGC.

Captain Edmond R. McCarthy, Jr., JAGC, aruged the cause for appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel John T. Edwards, JAGC, Major Patrick M. Flachs, JAGC, and Captain Glenn D. Gillett, JAGC.

Before HANSEN, SU-BROWN, and COKER, Appellate Military Judges.

OPINION OF THE COURT

COKER, Judge:

Appellant was charged with committing indecent liberties and attempted carnal knowledge of his thirteen year old daughter in violation of Articles 134 and 80, Uniform Code of Military Justice, 10 U.S.C. 934 and 880 (1976), and of rape of a fellow soldier in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. 920 (1976). He pleaded not guilty to all charges, but was found guilty by a general court-martial

of officer and enlisted members of the indecent liberties offense. The confinement portion of his adjudged sentence of a bad-conduct discharge, confinement at hard labor for five years, total forfeitures, and reduction to Private F-1 (sic) was reduced by the convening authority to three years, but otherwise was approved. The evidence supporting his conviction includes his confession and the statements his daughter made to (1) a school counselor; (2) a school nurse; and (3) an agent of the Criminal Investigation Command (CID). Of thirteen assignments of error by appellant, six relate to the admissibility of the three statements by his daughter. While this Court finds that two of the statements were admitted erroneously, we find no prejudice.

On November 5, 1981, at approxiamately 2130 hours, the incident involving the appellant and his daughter occurred. At 0820 hours the next morning, the daughter asked to speak to a school counselor. A conversation with the counselor took place at approximately 1000 hours and lasted for about one hour. Without benefit of leading questions or prompting, she detailed the incident of the previous evening. From 0820 hours and through the period of the conversation, her emotional reactions and appearance were distinctly abnormal. The school nurse was called in by the counselor and the daughter repeated her story. Subsequently, she was taken to the CID where she executed a sworn, written statement that again repeated the basic information she had given the counselor. The daughter was not called as a witness at the trial and all three statements were admitted into evidence, the first two as excited utterances under Rule 803(2), Military Rules of Evidence [hereinafter cited as Mil.R.Evid.], and the written statement under Rule 803(24), Mil.R.Evid., the so called residual hearsay exception.

Under the particular facts and circumstances of this case, we find that the daughter's unsolicited and unquestioned statement to her counselor related to a startling event and was made by her while still under the stress of excitement caused by that event. Such declaration was, therefore, admissible at appellant's trial under Rule 803(2), Mil.R.Evid. *United States v. Urbina,* 14 M.J. 962 (A.C.M.R.1982), *pet.*

denied, 15 M.J. 380 (C.M.A.1983). The facts do not support the same conclusion as to the declaration to the school nurse. While the two declarations were part of a continuous episode, the second was more a result of the counselor's action in initiating the discussion with the nurse and the statement more a result of their urgings and questions. Yet, we perceive no prejudice to appellant. The second declaration was basically a repetition of the first one, and therefore, was only cumulative in effect.[1]

The statement to the CID does not fall within the meaning or intent of Rule 803(24), Mil.R.Evid. Initially, the Court questions whether the written out-of-court statement of a victim-witness, who is available, is admissible under any circumstances under Rule 803(24), Mil.R.Evid. The general heading of Rule 803, states that the unavailability of the declarant is not a pre-requisite for admissibility. Yet, fifteen of the exceptions pertain to some type of records and not the personal testimony of a declarant-witness. Three pertain to reputation testimony where the declarant must be present and subject to cross-examination as to their opinion. Three pertain to impressions, intent and memory and the declarant again must be present and subject to cross-examination as to the basis of their testimony. Only two, excited utterances and medical diagnosis, permit the use of a declarant's personal out-of-court statement. Both recognize the peculiarity of circumstances surrounding such declarations provide strong circumstantial guarantees of trustworthiness. The requirements in Rule 803(24), Mil.R.Evid., as to notice, particularities, and reasonable efforts, when considered in the context of the total rule, militate strongly against the government position that mere absence, as opposed to unavailability, of a declarant is sufficient to admit the personal and out-

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[1] We note in addition that this second declaration, with the proper foundation, may well have been admissible under Rule 803(4), Military Rules of Evidence, as a statement made for medical diagnosis and treatment. *See* Army Regulation 608-1, Personnel Affairs, Army Community Services Program, para. 7-5, (15 May 1983).

of-court statement of such a declarant. The rule, in context, requires either the in-court testimony of the declarant to provide a basis for admissibility, peculiar circumstances that guarantee trustworthiness, or the unavailability of the witness. The specific language of Rule 803(24)(B) Mil.R.Evid., does indicate some necessity concerning availability. To accept the further government argument that a sworn, contemporaneous statement to the police is automatically more probative and trustworthy than in-court testimony would be a rejection of the American system of criminal justice as embodied in the fourth, fifth, and sixth amendments.

In the opinion of the Court, the only basis for the admissibility of the daughter's statement to the CID, under the facts and circumstances of this case, was Rule 804(b)(5), Mil.R.Evid. This exception to the Hearsay Rule appears specifically designed to address the problem of family members who are witnesses to an intra-family criminal offense. This rule requires a govenmental showing of unavailability of the witness. In the case before the Court, the government failed utterly to show unavailability. Indeed, the record contains no evidence that the government used any of the normal prosecutorial or judicial means available to secure the presence of the witness, even though the trial judge offered the use of his judicial authority to do so.

However, as was the declaration to the school nurse, the statement to the CID was cumulative in content and effect. It provided no additional evidence as to the offense. The government fully proved its case beyond a reasonable doubt through the appellant's confession and the corrobative evidence of the declaration to the school counselor. We find that the erroneous admission of the two statements did not materially prejudice the substantial rights of the appellant. In determining that his rights were not abridged, we note, the failure of appellant to request the presence of the witness, the failure to object to her absence, and the failure to raise any constitutional argument.

The remaining assignments of error are not meritorious.

The findings of guilty and the sentence are affirmed.

Chief Judge HANSEN and Judge SU-BROWN concur.

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No. 87-832

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES ARNOLD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission as an excited utterance of statements made by petitioner's daughter to her school counselor violated the Confrontation Clause of the Sixth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-12a) is reported at 25 M.J. 129. The opinion of the Army Court of Military Review (Pet. App. 13a-16a) is reported at 18 M.J. 559.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1987. The petition for a writ of certiorari was filed on November 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Mannheim in the Federal Republic of Germany. He was convicted of taking indecent liberties with and committing indecent acts upon his daughter, a child under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice

(UCMJ), 10 U.S.C. 934. He was sentenced to confinement for five years, forfeiture of his pay, a reduction in rank, and a bad conduct discharge. The convening authority reduced the period of confinement to three years, but otherwise approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 13a-16a). The Court of Military Appeals affirmed (*id.* at 1a-12a).

1. On November 13, 1981, petitioner orally confessed to having sexually molested his teenage daughter, Charise. He also provided a written, sworn, and signed confession to an agent of the Army's Criminal Investigation Division (CID) (GX 4; Tr. 200-202). Petitioner admitted that he had entered his daughter's bedroom on the night of November 5, intending to teach her about sex and to have sexual intercourse with her (*ibid.*). He acknowledged that he had rubbed her thigh with his hand and pulled his penis from his trousers, but he said that he left the room when his daughter started to cry and just before his wife got out of the shower. Petitioner also explained that, a short time after he went to bed, he heard Charise crying, he put his clothes on, and he went to check on her. According to petitioner, his oldest son was standing by his bedroom door and said that he heard Charise crying. Petitioner said that he re-entered Charise's bedroom; she said that nothing was wrong, and petitioner returned to his bed.[1]

To corroborate petitioner's confession,[2] the government introduced statements made by his daughter to her school counselor, to a nurse, and to a CID agent on the morning after the assault. At the first opportunity on the morning after the assault, Charise contacted her school counselor

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[1] Petitioner recanted his confession at trial (Tr. 240-243).

[2] Under military law, a defendant's confession may be considered as evidence of his guilt only if independent evidence, direct or circumstantial, sufficiently corroborates the essential facts of the confession to justify an inference that it is truthful. Mil. R. Evid. 304(g).

and attempted to speak with him. According to the counselor, Charise was "very, very agitated" at that time, and her physical and emotional appearance was very different from what it normally was. Charise was normally "very bubbly," but that morning she seemed agitated and "very, very subdued" (Tr. 152; Pet. App. 3a).

Charise went on to her first two classes and then returned to the counselor's office. She was very quiet and subdued. Her first words to the counselor were, "Is the father supposed to be the first one to have sex with you?" The counselor asked, "Why are you asking this?" That question, he testified, "just opened the gate" (Tr. 152-153). The counselor said that, without leading questions or prompting, Charise broke into tears and poured out the details of her father's assault (Tr. 155; Pet. App. 3a).

Charise told the counselor that, on the previous night, petitioner accosted her in the kitchen of their home by fondling her pubic area (Tr. 153-154). Charise asked what was going on, and petitioner responded, "I just wanted to check out your reaction with boys" (Tr. 154). Later that night, petitioner entered Charise's bedroom after she had gone to bed. Petitioner told her to remove her underpants, and she obeyed. He then left the room because his wife was apparently just getting out of the shower. He instructed his daughter to leave her underpants off (Tr. 154-155, 170). Petitioner returned to his daughter's bedroom later, removed his penis from his pants, got on top of her, and attempted to have sexual intercourse with her. He told her that a father was supposed to be the first one to have sex with his daughter (Tr. 156-157). A noise from his wife's room caused petitioner to leave Charise's room. Before leaving, however, petitioner warned Charise that she was not to tell anyone about what he had done, and he reminded her that he had a gun (Tr. 157). Charise was crying as her father left (Tr. 156-157).

After Charise related the events of the previous evening, she was asked to repeat her story to the school nurse. Later that day, Charise gave a consistent sworn statement to a CID agent (GX 5). Charise recanted that statement on December 22 (GX 6).[3]

2. At trial, Charise's statement to the school counselor, the nurse, and the CID agent were offered in evidence to corroborate petitioner's confession. Over objection, the trial judge admitted the statements to the school counselor and to the nurse under Mil. R. Evid. 803(2) as excited utterances (Tr. 107).[4] Also over objection, the trial judge admitted Charise's statement to the CID agent under Mil. R. Evid. 803(24), the residual hearsay exception (Tr. 188-189, 192). Charise did not testify for the prosecution, nor did petitioner call her to disclaim the truth of any of her statements.

3. The Army Court of Military Review affirmed (Pet. App. 13a-16a). The court held that Charise's statements to her school counselor were properly admitted as excited utterances (*id.* at 14a). The court also held that it was error for the trial judge to admit the statements Charise made to the school nurse and to the CID agent, but that, because those statements were cumulative, the error was harmless (*id.* at 14a-16a).

4. The Court of Military Appeals affirmed by a divided vote (Pet. App. 7a). In an opinion announcing the judgment of the court, Judge Cox concluded that

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[3] Judge Cox noted that Charise lived at home during the period prior to the trial and that "[t]heoretically, the lapse of time between the date of the incident and the trial was sufficient to permit this young girl to be pressured in various ways not to testify" (Pet. App. 8a n.4). In fact, the prosecutor represented to the trial judge on the morning of trial that he could not find Charise even after checking her home and school (Tr. 102; see also Tr. 142-144).

[4] Mil. R. Evid. 803(2) was adopted without change from the Federal Rules of Evidence.

Charise's unsolicited and spontaneous statements to her school counselor while she was "very, very agitated" and "under the threat of being shot by her father" constituted excited utterances (*id.* at 6a-9a). Judge Cox added that, as a long-established and well-recognized exception to the hearsay rules, the exception for excited utterances is so firmly rooted that statements introduced under that exception are sufficiently reliable to satisfy the Confrontation Clause even in the absence of cross-examination of the declarant (*id.* at 7a). Under such circumstances, he concluded, the proponent of the evidence need not show that the witness is unavailable to testify at trial (*ibid.*). Judge Sullivan concurred in the judgment (*id.* at 8a-9a). He stated that petitioner's confession was sufficiently corroborated by other circumstantial evidence so that his conviction could be affirmed without addressing the admissibility of Charise's excited utterances (*id.* at 8a). Judge Sullivan also concluded, however, that Charise's statements to her school counselor constituted excited utterances under Mil. R. Evid. 803(2) because of her father's threats (Pet. App. 8a). Chief Judge Everett dissented. In his view, Charise's statements to the school counselor were not excited utterances, because of the delay between the time of the incident and the time that she made the statements (*id.* at 9a-11a).

ARGUMENT

Petitioner claims that his daughter's statements to her school counselor were admitted into evidence in violation of the Confrontation Clause of the Sixth Amendment. Petitioner's claim, however, is quite narrow. Petitioner does not maintain that his daughter's statements were not excited utterances,[5] nor does he contend that excited ut-

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[5] The lapse of time between the crime and Charise's statements, "although relevant[,] is not dispositive" of the question whether her

terances do not fit within a firmly-rooted exception to the hearsay rule.[6] Instead, petitioner argues that his daughter's statements should not have been admitted, because the government failed to show that she was unavailable to testify at trial and because her statements were not sufficiently reliable. Neither claim has merit.

1. Although petitioner now contends that the government should have been required to prove that his daughter was unavailable to testify at trial before the trial court admitted Charise's statements to her school counselor, petitioner did not object to the admission of her statements on that ground. Moreover, on the morning of trial the prosecutor represented to the court that he could not find Charise, who was living at home at the time, even after having two other government witnesses (the school counselor and nurse) look for her at home and at school (Tr. 102; see also Tr. 142-144). Thus, the record suggests that Charise was in fact unavailable to testify, and if petitioner had objected to her testimony on the ground that she was available, the court would have been justified in making a finding of unavailability. In any event, the government was not required to prove that Charise was unavailable before her statements to her school counselor could be admitted at trial.

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statements fit within the excited utterance exception to the hearsay rule. *United States* v. *Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

[6] The courts of appeals have agreed that the excited utterance exception is firmly rooted in the common law. *Puleio* v. *Vose*, 830 F.2d 1197, 1205-1206 (1st Cir. 1987) (citing a long history of cases over the past 200 years approving the excited utterance exception); *United States* v. *Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *McLaughlin* v. *Vinzant*, 522 F.2d 448, 450 (1st Cir.), cert. denied, 423 U.S. 1037 (1975); see also *Untied States* v. *Cree*, 778 F.2d 474, 502 (8th Cir. 1985) (Oliver, J., dissenting).

Petitioner relies (Pet. 6) on *Ohio* v. *Roberts*, 448 U.S. 56 (1980), as support for his claim that the government should have been required to prove that his daughter was unavailable. *Roberts*, however, does not require proof of the declarant's unavailability as a prerequisite to the admission of every out-of-court statement. *Roberts* involved the question whether the admission at trial of testimony given at a preliminary hearing violated the Confrontation Clause, and the cases cited and discussed in the Court's opinion involved the introduction at trial of testimony given at a prior judicial proceeding. 448 U.S. at 65, 74. The statement in *Roberts* on which petitioner relies (Pet. 6, quoting *Roberts*, 448 U.S. at 66)—that an out-of-court statement is inadmissible unless the declarant is shown to be unavailable—must be read in light of the facts of that case. As this Court subsequently explained in *United States* v. *Inadi*, 475 U.S. 387, 394 (1986) (citations and footnote omitted), "*Roberts* simply reaffirmed a long-standing rule * * * that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."

Although petitioner claims that *Inadi* stands only for the proposition that co-conspirator declarations can be introduced without the need to show that the declarant is unavailable, the rationale of *Inadi* is broader than that. The Court in *Inadi* distinguished prior testimony—which requires a showing of unavailability—from other kinds of testimony, not just from co-conspirator declarations. While former testimony "often is only a weaker substitute for live testimony," the Court explained, other exceptions to the hearsay rule have "independent evidentiary significance of [their] own" (475 U.S. at 394).

That analysis applies to excited utterances. Like a co-conspirator declaration, an excited utterance "often will derive its significance from the circumstances in which it was made." *Inadi*, 475 U.S. at 395. As in the case of a co-conspirator declaration, an excited utterance may be even more reliable than subsequent in-court testimony, because the relationship between the parties at the time of trial may significantly affect the reliability of the evidence the declarant gives from the stand. Thus, like co-conspirator declarations, excited utterances "derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." 475 U.S. at 395-396.

Concerns over reliability do not justify requiring the government to prove that a declarant is unavailable before the trial court may admit excited utterances. The primary function of the Confrontation Clause is to enhance the reliability of the factfinding process at trial.[7] The historical process of defining exceptions to the hearsay rule has identified classes of out-of-court statements that are particularly reliable. For that reason, the Court has explained that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66.

Excited uttterances have historically been admissible as exceptions to the hearsay rule, because they are made under circumstances indicating that they are sincere and are ordinarily made before a person develops a motive to fabricate. See C. McCormick, *Handbook of the Law of Evidence* § 297, at 704 (E. Cleary ed. 1972). For those reasons, excited utterances carry sufficent guarantees of

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[7] "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process" (*Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion)). See also *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985); *Roberts*, 448 U.S. at 66.

reliability that the additional safeguard of cross-examination is not constitutionally required. Excited utterances are admissible without a showing of unavailability, not because the Confrontation Clause is "a mere codification of the rules of hearsay," but because an excited utterance is one example of the situation where "the overlap is complete" between the constitutional provision and the hearsay rules (*California* v. *Green*, 339 U.S. 149, 155 (1970)), and cross-examination is not necessary to insure reliability.

2. Although petitioner concedes that the excited utterance exception is a firmly rooted exception to the hearsay rule (Pet. 9), he maintains that his daughter's excited utterance lacked sufficient indicia of reliability to satisfy the Confrontation Clause. That claim lacks merit. As this Court explained in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 10 (citation omitted), "*Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. * * * [N]o independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' " In any event, even if the trial court was required to determine whether Charise's statements to her school counselor were trustworthy, petitioner's own confession provided powerful corroboration of his daughter's statements. Moreover, the evidence that Charise had suffered some psychological trauma, along with the impulsive, nondeliberative nature of her statements, also tends to show that the statements were reliable. Finally, there was no evidence that Charise had any motive to fabricate her accusations. Under these circumstances, Charise's statements to her school counselor were sufficiently reliable to justify their admission even though she was not present at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES ARNOLD
SPECIALIST FIVE, UNITED STATES ARMY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In our petition we argue that the Court of Military Appeals erred by holding that a showing of unavailability of a declarant is not required for purposes of the Confrontation Clause of the sixth amendment, where the out-of-court statement of the declarant is offered under a firmly rooted exception to the hearsay rule. We also argue that notwithstanding the characterization of the statement in this case as an excited utterance by the court below, the statement does not bear adequate indicia of reliability to satisfy the Confrontation Clause.

Respondent incorrectly implies that the hearsay statement in question was offered only to corroborate Petitioner's recanted confession, in an apparent attempt to minimize the constitutional impact of the statement's improper admission. Respondent also suggests that a finding of unavailability of the declarant would have been justified in this case. Both of these assertions are contrary to the record. Further, con-

trary to Respondent's assertion, Petitioner does not concede that his daughter's statement was an excited utterance.

We reply to Respondent's arguments in *seriatim*:

(A) RESPONDENT'S ARGUMENT THAT THE HEARSAY STATEMENT WAS OFFERED ONLY TO CORROBORATE PETITIONER'S RECANTED CONFESSION

In his dissent below, Chief Judge Everett correctly points out "the issue is not one of the sufficiency of evidence to corroborate a confession but instead whether an accused has been prejudiced by reception of inadmissible evidence" (Pet. App. 11a). Although the statement of Petitioner's daughter may have had the effect of corroborating Petitioner's recanted confession, it was in fact admitted as substantive evidence at trial. No instruction was given by the trial judge limiting the court-martial members' consideration of the statement. To the contrary, the trial judge specifically instructed that the statement could be considered as substantive evidence (R. 304).

Whether or not the statement was admitted to corroborate Petitioner's recanted confession as Respondent asserts (Br. in Opp. 2,4) is of no real significance to the extent that it is clear from the record that the statement was offered, admitted, and considered as substantive evidence against Petitioner. The degree of the constitutional error committed is not minimized by Respondent's belief that the original goal of the government at trial was corroboration of a confession.

(B) RESPONDENT'S ARGUMENT THAT A FINDING OF UNAVAILABILITY OF THE DECLARANT WOULD HAVE BEEN JUSTIFIED

Respondent states that the trial court would have been justified in finding that Petitioner's daughter, Charise, was unavailable to testify at trial (Br. in Opp. 6). This position is totally contrary to that expressed by both the Court of Military Appeals and the Army Court of Military Review. Those courts correctly recognized that the government made no more than an "informal effort" (Pet. App. 2a) to have

Charise appear, and in fact "failed utterly to show unavailability" (Pet. App. 16a).[1]

(C) RESPONDENT'S ARGUMENT THAT ALL HEARSAY STATEMENTS ARE ADMISSIBLE WITHOUT A SHOWING OF UNAVAILABILITY IF THEY ARE RELIABLE

Respondent argues that *Ohio v. Roberts* is limited to its facts as clarified by *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986) (Br. in Opp. 7). Respondent urges the radical proposition that so long as a hearsay statement is presumptively reliable because it fails within a firmly rooted hearsay exception, the proponent need not show the declarant unavailable before that statement may be admitted as evidence against an accused. Petitioner submits, as this Court stated in *Bourjaily v. United States*, ___ U.S. ___, 107 S.Ct. 2775, 2782 (1987), that *Ohio v. Roberts* sets out the " 'general approach to the problem' of reconciling hearsay exceptions with the Confrontation Clause." However, *Inadi* and *Bourjaily* create an exception to that "general approach" only for statements of a co-conspirator made in the course and in furtherance of a conspiracy. Contrary to Respondent's position, *Inadi* is the exception and not the rule.[2]

The general rule laid out in *Ohio v. Roberts* includes two prongs, necessity and reliability. Respondent desires to eliminate the first. If a hearsay declarant is not present at trial for cross-examination, the proponent must first show that the declarant is unavailable in order to establish the necessity for using the statement in contravention of the accused's right of confrontation. *Ohio v. Roberts*, 448 U.S. at 66.

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[1] Certainly, the government failed to meet its burden of showing that there was a good-faith effort to obtain Charise's presence at trial. Barber v. Page, 390 U.S. 719, 724-25 (1968); Ohio v. Roberts, 448 U.S. 56, 74-75 (1980).

[2] Petitioner notes that the statement of a co-conspirator made during the course and in furtherance of a conspiracy is by definition not hearsay under both the military and the federal rules of evidence. *Compare*, Mil.R.Evid. 801(d)(2)(E) and Fed.R.Evid. 801(d)(2)(E).

If the declarant is available there is no need to abridge the right of confrontation. "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." *Inadi*, 106 S.Ct. at 1126. Respondent urges that use of the hearsay statement in this case is justified because the context in which the statement was made has evidentiary significance. Respondent cites *Inadi* as support for this position (Br. in Opp. 8). However, unlike the situation in *Inadi*, the hearsay statement in this case was not made during the commission of the offense by one criminally liable for the offense being prosecuted. Any evidentiary significance of the context in which the statement was made does not serve to meet the government's burden on an element of the offense nor has Respondent indicated why the context in which the statement was made cannot be explained or replicated during live testimony by the declarant before the trier of fact.[3]

Respondent urges this Court to accept the proposition that the proponent of a hearsay statement need not make a showing of unavailability of the declarant so long as the hearsay statement falls within a firmly rooted hearsay exception. If such a position is adopted, virtually all hearsay will be admissible against an accused without the opportunity for confrontation before the trier of fact. Only in those few remaining cases where the hearsay cannot be characterized as falling within a firmly rooted hearsay exception will an accused be permitted to confront the witnesses against him. Thus, the Confrontation Clause will become little more than a codification of the rules of hearsay.

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[3] Of course, the fact that the declarant in this case recanted her statement makes the task more difficult. But, Petitioner submits, that is part of the truth-finding process.

(D) RESPONDENT'S ARGUMENT THAT CHARACTERIZATION OF A HEARSAY STATEMENT AS AN EXCITED UTTERANCE BY THE COURT BELOW OBVIATES THE NEED FOR THE STATEMENT TO BEAR SUFFICIENT INDICIA OF RELIABILITY

Respondent represents that Petitioner concedes that his daughter's hearsay statement was an excited utterance (Br. in Opp. 5). Respondent misconstrues Petitioner's argument (Pet. 9).

In his opinion below, Judge Cox characterizes the hearsay statement in question as an "excited utterance" (Pet. App. 6a), a characterization with which Chief Judge Everett strongly disagrees in his dissent (Pet. App. 9a). Petitioner does not concede that Judge Cox's characterization was correct, rather Petitioner urges this Court not to consider itself bound by the improper characterization. Petitioner submits that the mere fact that the court below conveniently tucked this hearsay statement "into a pigeonhole which bears the label of a time-honored hearsay exception. . . .", should not be dispositive. *Puleio v. Vose*, 830 F.2d 1197, 1207 (1st Cir. 1987). We argue in the petition that it is necessary to consider whether the hearsay statement in question bears sufficient indicia of reliability to satisfy the purposes of the Confrontation Clause notwithstanding its characterization as an excited utterance by the court below. As we have pointed out, the hearsay statement of Petitioner's daughter does not meet the test for an excited utterance under the federal rules. *See, Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050 (6th Cir. 1983) *cert. denied* 464 U.S. 1071 (1984). Therefore, no presumption of reliability should attach for purposes of satisfying the Confrontation Clause, nor is the statement sufficiently reliable without the presumption to satisfy the purposes of the Clause.

CONCLUSION

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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